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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

COLIN JEFFREY PATTERSON,

Defendant and Appellant.

E065259

(Super.Ct.No. RIF1404068)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez,
Judge. Affirmed with directions.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and Melissa Mandel, Theodore M.
Cropley, and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Colin Jeffrey Patterson, pled guilty to the unauthorized use of another person's identifying information. (Pen. Code, § 530.5, subd. (a); count 1.)¹ Pursuant to the plea agreement, the court sentenced defendant to six months in jail followed by 18 months of mandatory supervision.

On appeal, defendant contends a term of his mandatory supervision requiring that he receive the probation officer's approval of his intended residence violates his constitutional rights to travel and free association. The People argue defendant waived his right to appeal the judgment as part of his plea agreement and that he has failed to obtain a certificate of probable cause; thus, the People claim the appeal should be dismissed. In the alternative, the People maintain we should affirm the judgment because defendant forfeited the issue by not raising it below. We affirm the judgment, with directions to modify the probation condition to replace the approval requirement with a notice requirement.

I. PROCEDURAL HISTORY

The People charged defendant by felony complaint with the unauthorized use of the personal identifying information of another person (count 1; § 530.5, subd. (a)), false personation (count 2; § 529, subd. (a)), and false representation to a peace officer (count 3; § 148.9, subd. (a)). On November 18, 2015, defendant pled guilty to the count 1 offense. In return, the People agreed to the sentence discussed above and to dismissal of the remaining charges.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

As part of his plea agreement, defendant waived any right to appeal. Defendant agreed that he “did the things that are stated in the charges that I am admitting.” The court asked defendant if it were “true that . . . you had some other guy’s identifying information and used it for some illegal purpose?” Defendant responded, “Yeah.”

On November 25, 2015, defendant signed a sentencing memorandum enumerating the terms and conditions of his mandatory supervision. By his signature, defendant indicated he had read, understood, and agreed to the terms, including the term that he receive the probation officer’s approval of his residence.

II. DISCUSSION

A. *Waiver and Forfeiture*

The People contend the appeal should be dismissed because defendant waived his right to appeal as part of his plea agreement and has not obtained a certificate of probable cause. Regardless, even if defendant has not waived his right to appeal, the People argue he has forfeited the issue because he failed to object to the condition of mandatory supervision at sentencing. We disagree.

A general waiver of the right to appeal does not include error occurring after the waiver because it was not knowingly and intelligently waived: “Such a waiver of possible future error does not appear to be within defendant’s contemplation and knowledge at the time the waiver was made.” (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.) It is settled that issues regarding proceedings held subsequent to the plea

for the purpose of determining the penalty to be imposed do not require a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74.) Failure to raise an objection in the lower court that a defendant's probation condition is unconstitutionally overbroad does not forfeit the issue on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

In this case, defendant does not purport to challenge the validity of his plea. Rather, defendant attacks the constitutionality of a term of his mandatory supervision which was imposed a week after he entered his plea. Thus, his waiver of his right to appeal does not cover the mandatory supervision condition and no certificate of probable cause is necessary to maintain the appeal. Furthermore, defendant's failure to object below does not forfeit his right to raise the issue on appeal because it is based on a pure question of law, easily remediable on appeal by modification of the condition. (*In re Sheena K., supra*, 40 Cal.4th at p. 888.)

B. Validity of Condition of Mandatory Supervision

Defendant contends the term of his mandatory supervision requiring that he reside at a residence approved by the probation officer is unconstitutionally overbroad. We agree.

To be valid, a probation condition "must (1) . . . relate[] to the crime of which the defendant was convicted, *or* (2) relate to conduct that is criminal, *or* (3) require or forbid conduct that is reasonably related to future criminality." (*People v. Bauer* (1989) 211

Cal.App.3d 937, 942 (*Bauer*).) “If a probation condition serves to rehabilitate and protect public safety, the condition may ‘impinge upon a constitutional right otherwise enjoyed by the probationer, who is “not entitled to the same degree of constitutional protection as other citizens.”’” (*People v. O’Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O’Neil*), quoting *People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) But an otherwise valid condition that impinges upon constitutional rights “must be carefully tailored, ““reasonably related to the compelling state interest in reformation and rehabilitation”” (*Bauer, supra*, at p. 942, quoting *In re White* (1979) 97 Cal.App.3d 141, 146.)

A probation condition cannot be overbroad. “A restriction is unconstitutionally overbroad . . . if it (1) ‘impinge[s] on constitutional rights,’ and (2) is not ‘tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.’ [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

However, even a facial challenge to constitutionality requires more than a one-size-fits-all approach. Our inquiry does not take into account the individual facts pertaining to this particular probationer—as would an “as applied” challenge—but it must take into account the nature of the case and the goals and needs of probation in general. For example, what is constitutional in a case involving drug usage is not

necessarily the same as what is constitutional in a theft-related case or, as here, a case involving the unauthorized use of another person's identifying information. This broad consideration of the nature of the case must inform all decisions about whether the condition has been "narrowly tailored," even where, as here, we do not reach the personal circumstances of the probationer.

Here, the offense is the unauthorized use of the personal identifying information of another person. The appropriate inquiry therefore, is whether the probation condition is reasonably related to the supervision of a person convicted of that crime. In that regard, we find *Bauer* instructive. In *Bauer*, the defendant was convicted of false imprisonment and assault. As a probation condition, the trial court required the defendant to "obtain his probation officer's approval of his residence" (*Bauer, supra*, 211 Cal.App.3d at p. 940.) The *Bauer* court held this condition failed the requirements for probation conditions, as it was not related to the defendant's crime and was not related to future criminality. (*Id.* at p. 944.) The *Bauer* court further concluded the restriction was unconstitutionally overbroad, explaining "[t]he condition is all the more disturbing because it impinges on constitutional entitlements—the right to travel and freedom of association. Rather than being narrowly tailored to interfere as little as possible with these important rights, the restriction is extremely broad," and gave the probation officer broad power over the defendant's living situation. (*Id.* at pp. 944-945.)

Bauer has been accepted since it was decided over 27 years ago, and has been applied in analyzing other probation conditions. For example, in *O'Neil, supra*, 165 Cal.App.4th 1351 (a case involving drug sales but not usage), the appellate court found a probation condition prohibiting the probationer from associating with persons not approved by his probation officer to be unconstitutionally overbroad. (*Id.* at pp. 1357-1358.) Relying on *Bauer*, the *O'Neil* court explained the probation condition placed no limits or guidelines on the probation officer's discretion. Thus, "[w]ithout a meaningful standard, the order is too broad and it is not saved by permitting the probation department to provide the necessary specificity." (*O'Neil, supra*, at p. 1358, fn. omitted.)

The probation condition here suffers from the same infirmity as the one in *Bauer*. It puts no limits on the probation officer's discretion. Probationer's residence could be disapproved for any reason, including inconvenience. The nature of the crimes does not suggest a need for such unfettered oversight. Further, there is nothing in the record to show that where defendant lived contributed to the crime. Like the court in *Bauer*, we do not find that the condition itself is inappropriate in all circumstances (see *Bauer, supra*, 211 Cal.App.3d at p. 944 [finding residence approval condition not related to the defendant and his crimes in the case, but not invalidating the condition in every case]), but that such approval was not related to defendant's crime and living situation in this case. Furthermore, the condition is not reasonably related to defendant's future criminality.

The parties correctly observed in their briefing that the constitutionality of probation conditions requiring residential approval was before our Supreme Court in *People v. Schaeffer* (2012) 208 Cal.App.4th 1, review granted October 31, 2012, S205260. However, the California Supreme Court has since dismissed review of that case.

We distinguish this case from *Schaeffer*. In that case, we allowed a similar probation condition to stand based on the defendant's convictions for possessing methamphetamine and being under the influence of a controlled substance. This was because the defendant's residence could have negatively impacted her rehabilitation should she have chosen to live in a residence where drugs were used or sold. Here, defendant's residence would have no such foreseeable effect on his rehabilitation from the crime he committed. Because defendant's living situation has not been shown to be reasonably related to future criminality and because there is no nexus between these circumstances and the instant offense, we conclude that the challenged condition should be modified. Thus, the challenged probation condition should be modified to read as follows: "Defendant shall keep the probation officer informed of his place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence."

III. DISPOSITION

The trial court is ordered to modify the mandatory supervision condition regarding residency to read: “Defendant shall keep the probation officer informed of his place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence.” In all other respects, the judgment is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

SLOUGH
J.